Supreme Court, U.S.
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No. 99-1078

In the

Supreme Court of the United States

October Term, 1999

PEGGY KERNAN, WARDEN,
Petitioner,

v.

BOBBY HENRY,
Respondent.

On Petition for Writ of Certiorari
For the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ORIGINAL

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QUESTIONS PRESENTED

Petitioner seeks certiorari on questions that are not presented in this case. This Court should deny certiorari because the Court of Appeals for the Ninth Circuit held that, under the facts of this case, the defendant's statements to police were involuntary and erroneously introduced at defendant's trial.

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I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

In 1988, Mr. Henry was arrested for shooting Bill Withrow, a friend and business associate. After shooting Mr. Withrow, Mr. Henry drove a short distance from the scene, then called 911, reported what he had done and asked to have the police sent to pick him up. During this call, Mr. Henry was weeping and berating himself, and did not attempt to disguise what he had done. When the police arrived, he surrendered and was taken to the Sacramento County Sheriff's Office. A short time thereafter, he was interviewed by Detectives White and Machen in an interrogation room. The Court of Appeals' opinion records what transpired during that interview succinctly and accurately. Petitioners' Exhibit C, Henry v. Kernan, No. 98-15768, slip op. at 12928-35 (9th Cir., May 26, 1999, amended October 25, 1999). The crucial points are: (1) the detectives recited the standard *Miranda*[1] warnings, and then, when Mr. Henry twice unequivocally asserted his right to counsel, deliberately and wilfully ignored his requests and continued to interrogate him without respite; (2) Mr. Henry was distraught and virtually incoherent during most of the interview; (3) Mr. Henry had never been arrested previously, and had no experience of police interrogation tactics; and, (4) during the interrogation, Mr. Henry did not specifically state that he shot Mr. Withrow because he believed Mr. Withrow was about to shoot him.

Mr. Henry was charged with the first degree murder of Mr. Withrow, and was tried twice. The first trial ended in a mistrial with the jury deadlocked at 11 to one for acquittal. At the second trial, the defense moved to suppress Mr. Henry's statements. At a hearing on the motion, one of the detectives, a twenty-year veteran with nine years' homicide experience, admitted that

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1. *Miranda v. Arizona*, 384 U.S. 436 (1965).

he and his colleague had deliberately continued to question Mr. Henry despite his invocations of his right to counsel, in the hope of obtaining impeachment evidence.

The trial court admitted Mr. Henry's statements on the ground that, although the detectives "intentionally went beyond the law," the circumstances were not such as to induce a false confession and therefore the statement was admissible as "impeachment" if Mr. Henry chose to testify. Mr. Henry testified, and his entire tape-recorded statement was admitted not only for impeachment but, in accordance with California evidentiary law, for the truth of the matters asserted therein. Petitioner's Exhibit C, Henry v. Kernan, slip op. at 12932-33. Thus, as the Court of Appeals noted, "[T]he primary evidence which established Henry's motive and rebutted his claim of self-defense was Henry's post-*Miranda* statement." Id., slip op. at 12933. Indeed, the prosecution used Mr. Henry's statement to argue during closing argument that Mr. Henry's statement showed that Mr. Henry was not motivated by fear but by the desire for revenge, an issue which the prosecution characterized as "the crux of the case." Id., slip op. at 12934. Mr. Henry was convicted of second-degree murder with a firearm use enhancement and sentenced to a term of seventeen years' to life imprisonment.

Mr. Henry's conviction was affirmed by the state appeals court, and review by the California Supreme Court was summarily denied. In 1995, Mr. Henry applied for habeas corpus relief in the United States District Court for the Eastern District of California. In 1997, the Magistrate Judge issued Findings and Recommendations recommending that relief be granted on the ground that the actions of the interrogating detectives violated Mr. Henry's constitutional privilege against compelled self-incrimination.

The district judge declined to accept the Magistrate Judge's recommendation and denied

relief. Mr. Henry then appealed the decision to the Court of Appeals for the Ninth Circuit.

In a unanimous opinion, the Court of Appeals for the Ninth Circuit reversed the district court and remanded. It directed the district court to issue a conditional writ of habeas corpus ordering Mr. Henry's release unless the State should retry him within a reasonable period of time without using his post-*Miranda* confession. The decision was published. Petitioners petitioned for rehearing and suggested rehearing *en banc*. On October 25, 1999, the appellate court amended its earlier decision and, with the amendment, denied rehearing and declined rehearing *en banc*. Petitioners obtained a stay of the mandate, and filed the instant petition for a writ of certiorari to the Court of Appeals for the Ninth Circuit. Because this case is not appropriate for review by this Court, respondent Henry opposes the petition.

II. REASONS FOR DENYING THE WRIT

A. THE COURT OF APPEALS HOLDING CONFORMS TO THE ESTABLISHED PRECEDENTS OF THIS COURT

The petition for certiorari is based upon a faulty premise. Petitioners insist that the Court of Appeals ruled that *voluntary* statements taken in violation of *Miranda* are excludable for any purpose. To the contrary, the Court of Appeals held that Mr. Henry's statements were *involuntary*. Ptrs. Exh. C, Henry v. Kernan, Case No. 98-15768, slip op. at 12927-29 (9th Cir., October 25, 1999). As this Court has repeatedly held, involuntary statements, whether obtained in violation of *Miranda* or not, are never admissible at trial for any purpose, including impeachment.

Petitioners urge this Court to grant certiorari on the ground that the Court of Appeals for the Ninth Circuit "announced a new exclusionary rule with respect to statements taken in

violation of *Miranda*." Petition at 6. Petitioners are wrong. This is not a *Miranda* case, but a case implicating the underlying Fifth Amendment guarantee against compelled self-incrimination. The Court of Appeals' holding conforms with and relies upon this Court's precedents, and thus does not implicate this Court's holding in *Teague v. Lane*.[2/]

Petitioners have conceded throughout this litigation that the interrogating detectives knew they were violating *Miranda* when they continued questioning Mr. Henry after he requested counsel *both times*. Petitioners have also argued that, even assuming that the detectives' false promise made subsequent statements involuntary, statements made between the first and second requests for counsel were voluntary. Petitioners now seek certiorari on the factual question whether Mr. Henry's statements after he first requested counsel but prior to his second request were voluntary. The Court of Appeals rejected this argument by finding that *all* of Mr. Henry's statements were involuntary. This factual determination was properly and correctly made by the Court of Appeals and is thus not grounds for a writ of certiorari. *See* Rule 10, Supreme Court Rules.

The Court of Appeals found all of Mr. Henry's statements to be involuntary on two grounds: first, that the detectives used psychological coercion to overcome Mr. Henry's will; and, second, that the deliberate and calculated purpose of the detectives' conduct, unlike that of the officers in *Harris*, was designed from the very beginning of the interrogation to break Mr. Henry's will and secure self-incriminating statements that could be used against him at trial under the guise of impeachment, but which would really be used as substantive evidence of his guilt. This Court has repeatedly held that the voluntariness of a confession is determined by

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2. 489 U.S. 288, 310 (1989).

examining the totality of the circumstances. *See Withrow v. Williams*, *supra*, 507 U.S. at 689 (collecting cases). It has long been established that the "circumstances" include the officers' conduct as well as its effect upon the suspect. *See, e.g.*, *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961). Where law enforcement officers deliberately violate *Miranda* in order to break a suspect's will, and succeed, then the statements obtained thereby are involuntary and inadmissible for any purpose.

Mr. Henry's statements were coerced by his interrogators' refusal to honor his requests for counsel. Petitioners attempt to distinguish, as they have done all along, between those statements that preceded and succeeded the detectives' false promise that any statements that Mr. Henry made could not be used against him. What petitioners ignore, but what the Court of Appeals recognized, is that from the first time Mr. Henry unequivocally invoked his right to counsel only to have it ignored and the interrogation continue without respite, the inherently coercive conditions of custodial interrogation combined with the officers' deliberate misconduct and Mr. Henry's own vulnerabilities to overcome his will.[3/] The detective's subsequent inducement, after Mr. Henry's second unequivocal request for counsel, merely increased the already crushing weight of coercion. Ptrs. Exh. C, slip op. at 12931 ("Because the police tactics *and* trickery produced a confession that was neither rational nor the product of an essentially free

---

3. Mr. Henry filed a sworn declaration which the Magistrate Judge expanded the record to include, pursuant to Rule 7 of the Rules Governing Section 2254 Cases. In this declaration, Mr. Henry described the physical actions of the interrogating officers, which are not of course apparent from the audiotape, and their effect on his state of mind. He also described how his training as an Air Force officer engaged in covert operations in Southeast Asia during the Vietnam War interacted with his perceptions of his interrogators, including their physical actions. He said that he had been trained for the eventuality that he might be captured by the enemy and that, if he was, he should not attempt to withhold information from them, but should attempt to appease them.

and unconstrained choice, *we hold that* Henry's post-Mirandized statements were involuntary, and therefore inadmissible for any purpose.")(emphasis added).

Thus, the Court of Appeals' holding does not, as petitioners assert, create a "new exclusionary rule" based on officers' deliberate misconduct for voluntary statements that otherwise would be admissible for impeachment. To the contrary, the appellate court's holding is squarely within this Court's precedents prohibiting the use of involuntary statements for *any* purpose.

B. THE COURT OF APPEALS DID NOT IMPOSE A NEW RULE REQUIRING STATE COURTS TO GIVE A LIMITING INSTRUCTION WHEN VOLUNTARY CONFESSIONS ARE ADMITTED FOR IMPEACHMENT; THEREFORE, THERE IS NO ISSUE FOR THIS COURT TO REVIEW, AND CERTIORARI SHOULD BE DENIED

The Court of Appeals held that all of Mr. Henry's statements were involuntary and inadmissible for all purposes. The court rejected petitioners' alternative argument, that part of Mr. Henry's statements were admissible under the impeachment exception to *Miranda*'s general exclusionary rule.

The Court of Appeals correctly distinguished between this Court's cases creating the impeachment exception in cases where law enforcement officers merely violated the *Miranda* rules and the conduct in this case, in which the officers' deliberate and wilful misconduct attacked the core protections of the Fifth Amendment. As the appellate opinion correctly notes, in *Harris v. New York*, 401 U.S. 222 (1971), this Court carved out an exception to the general rule excluding statements taking in violation of *Miranda*. But in *Harris*, and in *Michigan v. Tucker*, 417 U.S. 433 (1974), the interrogating officers did not have the benefit of this Court's guidance in *Miranda*, and therefore any violations were inadvertent. More importantly, the

violations in those cases did not implicate the core protections of the Fifth Amendment because there was no suggestion that the officers' deliberate misconduct produced compelled statements. Ptrs. Exh. C, slip op. at 12932, *quoting Cooper v. Dupnick*, 963 F.2d 1220, 1249 (9th Cir. 1992)(en banc), *cert. denied*, 506 U.S. 953 (1992); *see also*, *Guiffre v. Bissell*, 31 F.3d 1241, 1256 (3d Cir. 1994)(distinguishing case at bar from *Cooper* on grounds no evidence of deliberate violation of substantive rights). Here, as the appellate court noted, the officers' tactic was *designed* to generate a feeling of hopelessness. Ptrs. Exh. C, slip op. at 12931. Because the officers' deliberate misconduct was designed to and did generate a feeling a hopelessness, the Court of Appeals found that all of Mr. Henry's statements following his first request for counsel were involuntary and thus outside the *Harris* impeachment exception.

The Court of Appeals correctly distinguished this Court's cases creating the impeachment exception to the general exclusionary rule of *Miranda*. In *Harris v. New York*, *supra*, this Court expressly noted, "Petitioner makes no claim that the statements made to the police were coerced or involuntary." 401 U.S. at 224. Moreover, as previously discussed, the interrogation in *Harris* preceded this Court's *Miranda* decision, and, therefore, the police officers did not have the benefit of *Miranda*'s discussion of the kind of admonitions that would serve to secure the privilege against compelled self-incrimination. Thus, *ipso facto*, the officers did not deliberately violate the defendant's rights.

Likewise, in *Michigan v. Tucker*, *supra*, there was no claim that the defendant's statements were extracted by coercion; the interrogation predated *Miranda*; and there was, therefore, no deliberate police misconduct. 417 U.S. at 444-46. Indeed, in *Tucker*, this Court distinguished situations in which the *Miranda* rules alone were violated from those in which both

Miranda and the underlying Fifth Amendment rights were violated. *See Tucker*, 417 U.S. at 445-46. The *Tucker* Court found that the purpose of *Miranda* rules alone, to deter police misconduct during interrogation, are sufficiently served by prohibiting the introduction of evidence obtained in violation of *Miranda* from being used during the prosecution's case in chief. *Id.* at 447. Where, however, there is deliberate police misconduct designed to overcome the suspect's will and obtain involuntary statements, it is not *Miranda* alone which is violated. Indeed, exclusion of involuntary confessions was assured prior to *Miranda*, and does not depend upon it. *Id.* at 456. (BRENNAN, J., concurring). One of the justices who disapproved of *Miranda* still opined that even confessions by third-party witnesses, if involuntary, should be excluded. *Id.* at 461 (WHITE, J., concurring).

In *Oregon v. Hass*, 420 U.S. 714 (1975), the third case generally considered to have defined the impeachment exception and the only one of the three in which the interrogation itself actually postdated *Miranda*, this Court still found it dispositive of the issue that the defendant's statements had not been coerced. In *Hass*, the defendant, accused of bicycle theft, was given his full *Miranda* warnings and, on the way to the police station, requested counsel but was told that he would have to wait until they arrived at the stationhouse. The statement he made after requesting counsel but before arriving at the stationhouse was ruled inadmissible during the prosecution's case in chief. The defendant then took the stand and obviously perjured himself. On rebuttal, the previously-excluded statement was admitted. This Court held that the statement was properly admitted under the *Harris* exception to *Miranda*'s exclusionary rule. Important to this holding was the Court's finding that, "There is no evidence or suggestion that Hass' statements to Officer Osterholme on the way to [the police station] were involuntary or coerced."

420 U.S. at 722-23. Again, it was only *Miranda* and not the Fifth Amendment itself which was implicated.

Interestingly, in *Hass*, this Court recognized the potential danger that "when proper *Miranda* warnings have been given, and the officer then continues his interrogation after the suspect asks for an attorney, the officer may be said to have little to lose and perhaps something to gain by way of possibly uncovering impeachment material," but dismissed it as a "speculative possibility." *Hass*, *supra*, 420 U.S. at 723. In the instant case, that is precisely what occurred.[4/] As this Court said in *Hass*, "If, in a given case, the officer's conduct amounts to an abuse, that case, like those involving coercion or duress, may be taken care of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness." 420 U.S. at 723. This is such a case, and the Court of Appeals properly decided it applying "traditional standards for evaluating voluntariness." Petitioners cannot prevail, therefore, on their claim that review should be granted because the Court of Appeals' decision does not conform to those of this Court.

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4. Police officers throughout the state of California and in Arizona have, in fact, been trained to continue questioning "outside *Miranda*" for the express purpose of obtaining impeachment evidence. This training takes as its starting point the impeachment exceptions this Court created in *Harris* and its progeny. The detectives who interrogated Mr. Henry had received such training. The abuses to which the deliberate policy of violating *Miranda* have lead are demonstrated not only in the instant case but in *Cooper v. Dupnick*, 963 F.2d 1220 (9th Cir. 1992)(en banc) and *California Attorneys for Criminal Justice v. Butts*, ___ F.3d. __, No. 97-56510 (9th Cir., November 9, 1999, as amended upon denial of rehearing and rehearing en banc, January 3, 2000), both actions arising under 42 U.S.C. § 1983. Thus, it would appear, the deterrent effect upon law enforcement abuses *Miranda* was designed to exert has largely been lost since *Harris*, and will only be regained because of the cost of defending, and losing, these actions.

In *dicta*, the Court of Appeals cited a second factor in determining that the statements in this case did not fall within the impeachment exception. That is, under California's evidentiary rules, Mr. Henry's statements were perforce introduced as substantive evidence of his guilt.

Petitioners are correct in saying that the hearsay rule discussed by the Court of Appeals was upheld against a *Confrontation Clause* challenge by this Court in *California v. Green*, 399 U.S. 149 (1970). The issue in *Green*, however, has nothing to do with the issues presented here.

In *California v. Green*, a prosecution witness testified at trial that he did not recall certain events, whereupon the prosecutor "refreshed" his witness's recollection by reading to him from his inconsistent preliminary hearing testimony. In addition, the police officer to whom the witness had made certain statements concerning the crime (a minor marijuana offense) testified concerning the statements. Both the preliminary hearing testimony read into the record and the officer's testimony were presented as substantive evidence of the defendant's guilt under Section 1235 of the California Evidence Code, the same section cited by the Court of Appeals in the *dicta* portion of its opinion.

The issue in *Green*, as defined by this Court, was whether the Confrontation Clause of the Sixth Amendment was offended by a State's statutory rule permitting the introduction of prior inconsistent statements by a witness *other than* the defendant as substantive evidence of the defendant's guilt. *California v. Green*, 399 U.S. at 155-56. This Court found that it was not, as long as the declarant was testifying as a witness subject to full and effective cross-examination. *Id.*, 399 U.S. at 158. The Court's holding was based on its examination of the historical evils the Confrontation Clause was designed to avert: the use of depositions and ex parte affidavits in lieu of in-court testimony. The Court found that, while the hearsay rule against admitting out-of-

court statements helped to protect the Constitutional right to confrontation, as long as the witness was subject to cross-examination and could authenticate or deny his prior statements under oath the purposes of the Confrontation Clause were served.

Here, the evil that the *Miranda* safeguards are designed to avert is very different; the use of a *defendant's* compelled self-incriminating statements against him at trial. While the historical purposes of the Confrontation Clause are served if a testifying witness is subject to cross examination under oath and in the presence of the jury, the historical purposes of the Fifth Amendment's prohibition against compelled self-incrimination are not. "The privilege against compulsory self-incrimination was developed by painful opposition to a course of ecclesiastical inquisitions and Star Chamber proceedings occurring several centuries ago." *Michigan v. Tucker*, 417 U.S. 433, 440 (1974). As this Court has previously held, a confession that is obtained through compulsion must not be used at trial "even if it is true, because of the 'strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will.'" *Jackson v. Denno*, 378 U.S. 368, 385 (1964), *quoting Blackburn v. Alabama*, 361 U.S. 199, 206-07 (1960); *see also*, *Withrow v. Williams*, 507 U.S. 680, 691-92 (1993)(reciting the values the Fifth Amendment protects), *quoting Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 55 (1964).

Whereas, therefore, this Court found that the California hearsay rule did not violate the Confrontation Clause because it still permitted the jury to fully assess the credibility of a witness, it does not follow that the Fifth Amendment is satisfied when the same rule is used to admit a defendant's compelled confession as substantive evidence of his guilt. Admission of a

defendant's compelled self-incriminating statements is of an altogether different order than the admission of prior inconsistent statements of any other witness. This Court in *Jackson* recognized the danger that a jury may not be able to comprehend the policy reasons forbidding their reliance on a coerced by true confession and may not be able, therefore, to sort out the circumstances under which the confession was obtained from the fact of the confession itself. *Jackson v. Denno, supra*, 378 U.S. at 382.

For the reasons stated above, petitioners' citation to *California v. Green* is inapposite. Moreover, their entire argument is based upon a distortion of the Court of Appeals' opinion. Petitioners completely mischaracterize the Court of Appeals' mention in *dictum* of California's hearsay rule as a "holding" that state trial courts "are obligated to instruct sua sponte that statements admitted for impeachment under *Harris v. New York* may only be considered for that purpose and may not be considered for the truth of the matter." First, the Court of Appeals' decision is expressly limited to the specific facts of the instant case, and does not announce a general rule at all. Ptrs. Exh. C., slip op. at 12933.

The Court of Appeals in its harmless error analysis determined that admission of Mr. Henry's involuntary statements "went to the root of their burden to prove beyond a reasonable doubt that Henry acted with the intent required for a conviction of first or second degree murder and not in self defense." Ptrs. Exh. C, slip op. at 12934. "No other evidence of intent could have impressed the jury in the same way that defendant's own statements did. . .." *Id.*, *citing Arizona v. Fulminante* 499 U.S. 279, 296 (1991). While it is true that Mr. Henry's trial counsel declined a limiting instruction, it is also true that no limiting instruction could have averted the harm done by admitting the involuntary statements in the first place. *See Arizona v. Fulminante*, 499 U.S. at

313 (KENNEDY, J., concurring)(distinguishing the "indelible impact" of a confession from the "impact of an isolated statement that incriminates the defendant only when connected with other evidence": "If the jury believes that a defendant has admitted the crime, it doubtless will be tempted to rest its decision on that evidence alone, without careful consideration of the other evidence in the case.").

In sum, the Court of Appeals properly considered the specific facts of this case and based its holding on those facts. Petitioners' argument that certiorari should be granted because the opinion announced a general rule is based on a complete misreading of the opinion, and is not grounds for granting review.

III. CONCLUSION

The Court of Appeals for the Ninth circuit correctly upheld precedent holding that a defendant's involuntary confession is inadmissible for any purpose. The Petition for Writ of Certiorari should be denied.

Dated: January 25, 2000

QUIN DENVIR
Federal Defender

BY _____
CONNIE MARIE ALVAREZ*
Assistant Federal Defender
Attorney for Respondent
Bobby Gene Henry

*Counsel of Record

No.99-1078

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

PEGGY KERNAN, WARDEN

Petitioner,
-vs.-
BOBBY HENRY,

Respondent.

CERTIFICATE OF SERVICE

I, Connie M. Alvarez, being first duly sworn, depose and say:

On January 25, 2000, the RESPONDENT'S BRIEF IN OPPOSITION AND MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS was served on all parties required to be served in compliance with Supreme Court Rule 29.3, by depositing the documents, first-class postage prepaid, in a United States mailbox on January 25, 2000, addressed to counsel as follows:

GREGORY W. BAUGHER
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1300 I Street, Suite 125
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Solicitor General of the United States
950 Pennsylvania Ave., N.W. Room 5614
Washington, DC 20530-0001

Executed at Sacramento, California, January 25, 2000.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

CONNIE M. ALVAREZ
Assistant Federal Defender